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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN SOLIS, et al., Defendant and Appellant.	B204194 (Los Angeles County Super. Ct. No. BA306533)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Gonzalez Lomeli, Judge. Affirmed.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Juan Solis.

Mark D. Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant Isaac Martinez.

Edmund G. Brown Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendants and appellants Juan Solis and Isaac Martinez guilty of two counts of first degree special circumstance premeditated and deliberate murder and two counts of minor in possession of firearms.[1] On the murder counts, they were sentenced to two terms of life without the possibility of parole plus two 25-years-to-life terms for gun use. They raise numerous claims on appeal about: (1) the sufficiency of the evidence to support the premeditated and deliberate findings and the gang enhancement and special circumstance allegations; (2) the admission of evidence that Solis had a gun that was not the murder weapon; (3) the admission of "bad character" evidence; (4) the admission of Martinez's statement that allegedly implicates Solis; (5) the aiding and abetting instructions; (6) the flight, gang special circumstance and motive instructions; and (7) various sentencing errors.[2] We either find no error or harmless error; therefore we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The party on the night of January 28, 2006.*

Erica Beas was celebrating her 18th birthday with a party on January 28, 2006. The party was at a house located at the top of a hill. Defendant Martinez was at her party with defendant Solis; Beas went to school with both of them and Solis lived near her. A little after 11:00 p.m., a fight between two guys and "Justin" broke out, at which time the music was turned off and people started to leave, although some people remained. Around 1:00 p.m. Beas heard gunshots. By the end of the night, Jacob Santiago and Jessie Mendoza were dead.

About one week after the party, Beas identified Martinez from a photographic line-up as a person at her party. She also identified Solis from a photographic line-up as a person who was at her party, but "[he] left early" with Martinez.

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[1] Martinez was also convicted of possession of a controlled substance.

[2] Solis joins in any applicable arguments made by Martinez.

B. *Charlyne Vivanco*

Charlyne Vivanco arrived at the party around 11:30 p.m. or midnight, but she stayed outside on the street, drinking. Doug[3] and Jose Fuentes got into a fight and then it erupted so that " 'all of us' " or " 'all of them,' " including Mendoza, were involved. A tall Black man fired gunshots into the air, but nobody stopped fighting. At some point Santiago was knocked unconscious, and she and Genesis Aguirre put him into Eagan Jackson's car. Someone pushed her aside and shot Santiago.[4] At a live-line up in June 2006 she identified Solis as having the same hair and skin color as the shooter, and she wrote " 'may be number 4.' " At trial, she identified Solis as the person in position No. 4.[5]

C. *Jose Fuentes*

Jose Fuentes arrived at the party around 11:00 p.m. with, among others, the victims, Mendoza and Santiago. Although Fuentes did not stay long, while at the party he had a drink and he saw one person wearing a No. 15 Carmelo Anthony Denver Nuggets jersey.[6] After leaving the party, he went to the bottom of the hill. People were arguing. He heard gunshots and saw people running down the hill from the top. One individual held what looked like a black "cop" gun while another person wearing a jersey appeared to be concealing something in his sweater. One of the men wore a black zip-up hooded sweater and a black hat with a " 'C' " on, and a second person wore a No. 15 jersey with a sweater over it. Everyone scattered, and Fuentes heard more gunshots; in total, Fuentes heard at least three groupings of shots. Fuentes got into a friend's car, but he turned and saw the man wearing the black hooded sweater and black hat shoot at

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[3] Two men named Doug were at the party—Doug Mejia and Doug Lara.

[4] She could not identify the shooter at trial.

[5] She could not recall hearing anyone say, " 'No one is in any crew[;] we don't gangbang' " or telling detectives she heard such a statement.

[6] He recognized at trial a picture of a jersey.

Mendoza, who stood near Eagan Jackson's car, a gold Toyota Camry, about six feet from the shooter.

On December 27, 2006, Fuentes reviewed a photographic line-up. He identified No. 6, defendant Martinez, as " 'stand[ing] out as the pretty-boy looking individual who subconsciously strikes fear into me. 6 looks like a face that was at the party.' " The face reminded him of the No. 15 jersey, but at neither the preliminary hearing nor trial could he identify Martinez as someone who was at the party.

D. *Aaron Ronquillo*

Aaron Ronquillo went to the party at around 11:00 p.m., but he too was at the bottom of the hill. "Jose" and another person got into a fight, and Santiago tried to break it up, but he got hit and fell to the ground. Mendoza asked, " 'Who hit Jacob? Who hit my friend?' " He ran around and took off his shirt. A tall Black man shot a gun in the air; this man was the first person to fire a gun.

After helping Santiago, Ronquillo heard gunshots from up the hill. Two Hispanic men between the ages of 17 and 19 with guns were on the hill; one wore a baby blue and yellow No. 15 Carmelo Anthony jersey[7] and the other, who was heavyset, wore a dark, hooded sweater. After hearing the shots, Ronquillo heard "shouts telling them—they were saying 'Get out of here' " and " 'Cypress' " and " 'Get out of our hood.' " Ronquillo was not certain if the men with the guns said this, but the statements appeared to be coming from their direction. Everyone began to go to their car. Anthony Cardines was near a friend's car when the man wearing the jersey pointed the gun at Cardines's head. Ronquillo continued to walk to his car, but he heard more gunshots. Looking back, he saw them shooting into Eagan Jackson's car.

In a photographic line-up on February 3, 2006, Ronquillo identified " '4 and 6' " as looking " 'similar to the shooters,' " but he meant to identify only No. 6, Martinez, as the man wearing the jersey. At a live line-up on June 13, 2006, he picked two individuals (Nos. 2 & 3) who resembled the shooters, one of whom was Martinez. At a second live

[7] Ronquillo initially told the police that the man wore a UCLA jersey, but after he calmed down, he realized it was a Denver Nuggets jersey.

line-up on June 13, he identified No. 4, defendant Solis, as the man wearing a dark, hooded sweater shooting into Eagan's car.

At the preliminary hearing, Ronquillo identified Solis as one of the shooters.

At the time he testified at trial, Ronquillo had a charge pending for attempted grand theft, so he testified under a grant of immunity.

E. *Doug Mejia*

Doug Mejia was at the party that night, and when the argument erupted between his friend, "Justin," and another guy, he tried to stop it by taking Justin outside. They walked toward the bottom of the hill, where cars were parked. "Jose" and another guy started arguing, and somebody hit Santiago, who passed out. Mejia laid him on the ground. After Santiago was hit, Mendoza became "really, really mad" and he took his shirt off. "D's" friend shot his gun once into the air to try and calm people down.

Three young guys[8] wearing hooded sweaters and carrying guns came down the hill and shot into the air. One man wore a No. 15 Carmelo Anthony jersey; he was light-skinned, bald and somewhat short. Mejia would not recognize the man if he saw him again. The other two men with guns were taller and one wore a dark gray hooded sweater and the other a black one. The men did not say anything before shooting, but after they said " 'We don't want no drama or snappers.' " That night, Mejia heard different sets of gunshots: the first gunshots were into the air, then he heard about 10 more gunshots.

A self-described "sports fanatic," Mejia collects jerseys, and the jersey he saw the night of the party was a "throwback" jersey—a jersey that is old but is replicated so that current players can wear it.

Detective James King interviewed Mejia on February 1, 2006. Mejia identified a shooter as a male Hispanic, 5 feet 3 to 4 inches tall, bald, 18 years old, 140 to 160 pounds wearing a light blue Denver Nuggets jersey. Mejia described a second shooter as a male Hispanic, 5 feet 6 to 7 inches tall, average build wearing a gray zippered hooded sweater

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[8] They appeared to be 16 to 18 years old.

and a black shirt. This second shooter may have had a hat, but Mejia believed he had short hair.

F. *Genesis Aguirre*

When the party was over, Genesis Aguirre walked down the hill to Eagan Jackson's car. A fight broke out and Santiago was hit. She then heard "a lot," 10 or more, gunshots. One or two people were pulling Santiago out of the car. She didn't see anyone get shot or see anyone with a gun.

G. *Yvette Amaya*

After the party broke up, Amaya went to Eagan Jackson's car and a fight broke out. Santiago tried to break up the fight, which included a guy wearing a green hat with a " 'C' " on it. When Santiago passed out, she and her friends put him into Jackson's car. Mendoza tried to get in the car, but gunshots were being fired. Somehow, Santiago was no longer in the car. Amaya was unable to make any identifications, but she remembered that the people whom she thought might be the shooters wore black and one of them wore a green hat with a " 'C' " on it. She never saw anyone with guns.

H. *Eagan Jackson*

Eagan Jackson drove himself and some friends to the party, and he parked his car at the bottom of the hill. After leaving the party, he went to his car with Aguirre and Amaya. He saw a "big scuffle" and "Jesse [Mendoza] getting rowdy" because Santiago had been hit. He did not see Santiago in his car. Two guys came down the hill with guns and they fired shots into the air. One man wore a black hoodie and the other wore a baby blue with yellow trim No. 15 Carmelo Anthony jersey. One of the men shouted, " 'Get the fuck out of here right now.' "

Jackson ran to his car. Aguirre, Amaya and "David" were in the car and Cardines was trying to get in, but the guy in the Carmelo Anthony jersey put the gun to his face and "I believe asked him 'Where are you from.' " Cardines said he was from " 'nowhere,' " and the guy in the jersey went towards the back passenger side of the car. To his knowledge, none of his companions, including Santiago and Mendoza, were gang members. Four or five guys were "jumping" Mendoza; and the guy wearing the jersey

and the one wearing the dark hoodie started shooting. When they started shooting, Amaya tried to pull Santiago into the car. Jackson heard a series of shots, although he thought there were two series of gunfire.

At a live line-up, Jackson identified three people (Nos. 3, 4 & 6), and he wrote that " 'the subject in my case may be number[s]' . . . 3 and 4," and No. 4 was defendant Solis. He also wrote that " 'the subject in my case is number 6.' " But at trial he said he made a mistake; he meant to write he wasn't sure if No. 6 was the actual person.[9] He was shown two or three photographic six-packs, but he couldn't make any identifications from them.

I. *Anthony Cardines*

After the party ended, Anthony Cardines went to Jackson's car. Although he didn't see an argument or see Santiago get hit, he did see him on the ground. Individuals approached him from behind, and he could remember a white and blue Nuggets jersey with the No. 15 on it and a Cubs hat. The man wearing the jersey approached him and pointed a gun at his face and asked where he was from. Cardines replied he was from nowhere. He got into the car and then he heard gunshots. They tried to pull Mendoza into the car, but he was getting shot.

At trial he could not remember hearing them shout anything, but he told detectives he heard someone shout something "Park." He couldn't identify the person who pointed the gun at him.

Like Ronquillo, Cardines was testifying under a grant of immunity; he had been charged with Ronquillo for attempted grand theft.

J. *Evidence.*

Jacob Santiago was shot five times, all in the back, and all five resulting wounds were fatal. Jessie Mendoza[10] had 16 gunshot wounds. Some of the wounds to his back suggest his body was in motion while being shot. No soot or stippling was found on

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9 At a second live line-up Jackson selected Nos. 3 and 5.

10 His full name was Jesse Mendoza Cortez.

either body, meaning that they were shot from a distance of at least one and one-half to three feet away.

Forty caliber live rounds, .40 caliber semiautomatic casings and a .380 caliber casing were recovered from the crime scene. Forty and .44 caliber bullets or fragments were recovered from both Santiago's and Mendoza's bodies.

On February 2, 2006, Officer Juan Chavez searched defendant Martinez's home. From his residence, officers recovered a .25 caliber raven semiautomatic pistol, a sawed-off shotgun in pieces and two baggies containing methamphetamine.

From defendant Solis's home, officers recovered a loaded .40 caliber semiautomatic pistol with ammunition and a sawed-off shotgun. Forty caliber ammunition rounds were Smith & Wesson, Winchester brand. Cypress Park graffiti was in his basement. The .40 caliber bullets retrieved from the victims' bodies were fired from the same gun, a Smith & Wesson; but they were *not* fired from a .40 caliber gun found in Solis's home.

Photographs taken at the party depict a person wearing a Carmelo Anthony jersey. Officer Eric Hurd identified him as defendant Martinez, whom he'd stopped numerous times. A search of Martinez's home turned up a No. 15 Carmelo Anthony blue with yellow trim jersey, as well as blue and white Nike tennis shoes similar to ones worn by the person wearing the jersey at the party.[11]

K. *Gang evidence.*

Officer Eric Hurd testified as a gang expert for the People. Cypress Park gang was formed in the 1950's. Its boundaries are Figueroa to the South, Division Street to the North, Isabel Street to the East and San Fernando Road to the West. Gang members commonly use their hands to make a "C" and "P," and the Western Exterminator man is their mascot. Gang members wear sports attire with the first letter of their gang, so Cypress Park wears Cubs attire. The Avenues gang is their main rival, and the party took

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[11] People's exhibit No. 3 is a photograph taken at Beas's party.

place in Avenues territory. Cypress Park's primary activities are assault with a deadly weapon, attempted murder and murder, robbery and sale of controlled substances.

Martinez self admitted to Officer Hurd and explained he goes by Mousito and Lil' Clown, which is payaso in Spanish. During encounters with other officers in August 2005 and January 2006 and before February 2, 2006, Martinez admitted he was a member of the Cypress Park gang. He also told one of these officers that his moniker was Payaso. According to Officer Hurd, Martinez is an up-and-coming gang member. Martinez has "Cypress Park," "CP Boys" and Western Exterminator man tattoos. Letters and photographs, including a photograph of him throwing a "P" sign, containing gang references were in Martinez's home.

Solis admitted in August and September 2005 to officers that he was a Cypress Park gang member and that his moniker is Kwan. Solis has a "C" on his forearm, which he said stood for Cypress; he was in the process of getting a "P." He also admitted his gang membership to Officer Hurd.

Both Martinez and Solis reside in an area claimed by Cypress Park gang.

In Officer Hurd's opinion Martinez and Solis are members of Cypress Park gang and the crimes at issue benefit Cypress Park because it shows that the gang is not intimidated by anyone and the crimes intimidate and create fear.

L. *Defendants' statements*

Recorded statements made by the defendants to detectives were admitted. Before playing the tapes of the statements for the jury, the trial court instructed that evidence of the statements made by a particular defendant could be considered against that particular defendant making the statement, but not for purposes of the other defendant.

1. Defendant Martinez's statements.

When asked about the party, Martinez said his cousin "Jasmine" dropped him off, but he was there for only about 10 minutes. He was not at the party with anyone else; he only "met up" with Erica Beas. He left because three Black men wanted to beat him up after he found a gun and some beer belonging to them. At school people told him that he'd "killed some people." When the detective told Martinez his fingerprints were found

on the car, Martinez said, "Damn." He explained he was "talking to them." According to Detective Rivera, Martinez admitted wearing the No. 15 jersey.

2. Defendant Solis's statements.

Defendant Solis also gave a recorded statement to detectives. He got the guns found at his home from a guy in Highland Park, and he paid "three bills"—$300—for them. He bought a .40 caliber gun from the guy; he "just got it" before his home was searched. Sometimes at night he doesn't feel safe, so he got the gun and, although he carried it, he never used it. A year before he was walked into Cypress Park and is known as Kwan. Solis denied being at the party. But he admitted he'd avoided a police perimeter at his house set up to locate him.

II. Procedural background.

Trial was by jury. On September 6, 2007, the jury found Martinez guilty as follows:[12]

Count 1, the first degree murder of Mendoza (Pen. Code, § 187, subd. (a)).[13] The jury found true two special circumstance allegations, i.e., that Martinez was convicted of more than one offense of murder in the first or second degree (§ 190.2, subd. (a)(3)) and that the murder was carried out to further the activities of a criminal street gang (§ 190.2, subd. (a)(22)). Gun use (§ 12022.53, subds. (b), (c) & (d)) and gang enhancement (§ 186.22, subd. (b)(1)(C) & (4)) allegations were also found true.

Count 2, the first degree murder of Santiago (§ 187, subd. (a)). As with count 1, the jury found true two special circumstance allegations (§ 190.2, subd. (a)(3) & (22)), gun use (§ 12022.53, subds. (b), (c) & (d)) and gang enhancement (§ 186.22, subd. (b)(1)(C) & (4)) allegations.

Counts 5 and 6, possession of a firearm by a minor (§ 12101, subd. (a)(1)). The jury found true a gang enhancement allegation (§ 186.22, subd. (b)(1)(A)).

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[12] The jury found Martinez and Solis not guilty of the attempted murders of Genesis Aguirre, Eagan Jackson, Anthony Cardines and Yvette Amaya.

[13] All further undesignated statutory references are to the Penal Code.

Count 7, possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). The jury found not true a gang enhancement allegation as to this count.

The jury similarly found defendant Solis guilty of the first degree murders of Mendoza and Santiago (counts 1 & 2) and found true the same special circumstance, gun use and gang allegations as were found true against Martinez. Solis was found guilty of counts 3 and 4, possession of a firearm by a minor (§ 12101, subd. (a)(1)) and a gang enhancement allegation was found true (§ 186.22, subd. (b)(1)(A)).

On November 27, 2007, the trial court sentenced both defendants on counts 1 and 2 to two terms of life without the possibility of parole plus two consecutive 25-years-to-life terms (§ 12022.53, subd. (d)). Solis was sentenced to an additional two-year term for possession of a firearm by a minor (count 3) plus the midterm of three years for the gang enhancement. Martinez was sentenced to a consecutive two-year term for count 5 plus a three-year term for the gang enhancement.[14]

DISCUSSION

I. Sufficiency of the evidence.

Martinez and Solis make two contentions concerning the sufficiency of the evidence. They first contend there is insufficient evidence to support the jury's finding that the murders of Santiago and Mendoza (counts 1 & 2) were premeditated and deliberate; and therefore their federal due process rights have been violated (*Jackson v. Virginia* (1979) 443 U.S. 307, 318). Second, they contend there is insufficient evidence to support the true findings on the gang enhancement and special circumstances allegations. As we explain below, we disagree with both contentions.

A. *There is sufficient evidence to support the jury's finding that the defendants premeditated and deliberated the murders.*

"Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation

[14] The court sentenced Martinez to a concurrent two-year term plus three years on count 6 and to a concurrent two-year term for count 7.

and deliberation . . . . Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) "We draw all reasonable inferences in support of the judgment. [Citation.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) " 'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." ' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.) " 'An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.' " (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.)

A murder that is premeditated and deliberate is murder of the first degree. (§ 189; *People v. Burney* (2009) 47 Cal.4th 203, 235.) " ' "In this context, 'premeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' " ' [Citations.]" (*Burney*, at p. 235.) The process of premeditation and deliberation does not require any extended period of time; rather, the " ' "true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) Three basic, but not exhaustive, categories of evidence will sustain a finding of premeditation and deliberation: (1) motive; (2) manner of killing; and

(3) planning activity. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27; see also *People v. Perez, supra*, 2 Cal.4th at p. 1125.) All factors need not be present to sustain a finding of premeditation and deliberation. (*People v. Pride* (1992) 3 Cal.4th 195, 247.)

Factors supporting the jury's finding of premeditation and deliberation are present here. There is evidence of a gang-related motive. Both defendants are members of the Cypress Park gang, whose main rival is the Avenues gang. The party at which the murders occurred was located in Avenues territory. Witnesses who were loitering at the bottom of the hill saw at least two men with guns coming down the hill, one of whom wore a black hat with a "C" on it; according to the gang expert, Officer Hurd, gang members often wear sports paraphernalia of a team whose name begins with the same letter as their gang. Aaron Ronquillo heard shouts of " 'get out of here,' " " 'Cypress,' " and " 'get out of our hood' " coming from the same direction as the men with guns. The man in the jersey held a gun to Anthony Cardines's head and demanded, " 'Where are you from' "—a typical gang query or challenge.

Although these facts support a finding that the murders were gang-motivated, defendants downplay them and argue instead that this was not a typical gang attack; rather, the murders of Santiago and Mendoza occurred as the result of some drunken melee gone horribly awry. They suggest that defendants got caught up in the middle of the fight and were trying to break it up. Perhaps that is one interpretation of the evidence; but our task on appeal is not to reweigh reasonable inferences and choose one such inference in favor of another.

Defendants also point out that the victims were not members of a gang; thus, they argue, this undercuts any gang motive. But the victim's gang status, or lack thereof, although relevant to, is not dispositive of whether a gang-related motive lay behind the crime. As we have explained above, there is evidence that the defendants were the shooters and that one or both of them issued gang-related challenges. Officer Hurd testified that gangs strive for "respect," and they accomplish this by, for example, engaging in crimes to create an atmosphere of intimidation and fear. A shooting such as occurred at Beas's party creates intimidation and fear in the community and, in the view

of the gang, leads to "respect." Therefore, notwithstanding that neither Santiago nor Mendoza were gang members, the evidence shows that the motive for the murders was gang related; and motive in turn supports the finding of premeditation and deliberation.

The manner of killing supports the finding as well. Several witnesses (Jackson, Fuentes and Mejia) testified that they heard different groupings of gunfire, between two to three; this suggests or supports the inference that the shooters paused or hesitated—hence they had time to deliberate—before shooting. Also, Santiago was knocked unconscious during the fight; therefore, he was no immediate threat. Friends put him in the back of Eagan Jackson's car, but he was shot and pulled out of the car. Also, Santiago had five gunshot wounds and Mendoza had sixteen. All five of Santiago's wounds were to the back. Some wounds to Mendoza's back suggest that his body was in motion while being shot, while others were consistent with attempts to defend himself. From this evidence, the jury could have inferred that the victims were shot either while unconscious or fleeing, thereby supporting the conclusion that their murders were deliberate, rather than spontaneous. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957 [manner of execution style killing supported conclusion that murder was premeditated and deliberate], disapproved on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

Finally, some evidence supports planning. The jury could have believed that Solis and Martinez went to the party together, armed with guns, which supports an inference that they planned or considered shooting someone. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [carrying the "fatal knife" into the victim's home showed planning].) That they might have armed themselves to protect themselves while in enemy turf is also one possibility, as defendant Solis suggests, but the jury was entitled to make either inference.

Thus, in sum, evidence of a gang-related motive, manner of killing and planning activity supports the jury's finding that the murders were premeditated and deliberate.

B. *There is sufficient evidence to support the true findings on the gang enhancement and special circumstances allegations.*

The jury found true gang enhancement allegations under section 186.22, subdivision (b)(1) and a gang-special circumstance under section 190.2, subd. (a)(22). The substantial evidence test we articulated above applies to our determination whether there is sufficient evidence to support the jury's true findings on the gang enhancement (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322) and on the special circumstance (*People v. Mickey* (1991) 54 Cal.3d 612, 678).

1. Gang enhancement allegations.

Section 186.22, subdivision (b)(1), provides for a sentence enhancement when a defendant is convicted of enumerated felonies " ' "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." ' " (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Hill* (2006) 142 Cal.App.4th 770, 773.) "It is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 18-19.)

The same evidence we discussed above in connection with the gang-related nature of the crimes is relevant to this issue. Specifically, evidence shows that Solis and Martinez are members of the same gang, Cypress Park. Gang challenges (e.g., "where are you from," "get out of our hood," and "Cypress") were heard during the events.

Solis, however, counters that the witnesses did not attribute these statements to him as opposed to Martinez, who was identified as the man who pointed a gun at Anthony Cardines's head and asked, " 'Where are you from?' " The evidence, however, shows that Martinez and Solis came down the hill *together*, both of them fired their guns and at least one witness, Ronquillo, said that gang-related statements appeared to be coming from the direction of the men with guns. (See *People v. Leon* (2008) 161

Cal.App.4th 149, 163 [sufficient evidence to support section 186.22 enhancement where prosecution established defendant committed crimes in association with fellow gang member, knowing he was a gang member]; *People v. Romero*, *supra*, 140 Cal.App.4th at p. 20 [evidence that defendant "intended to commit a crime, . . . intended to help [codefendant] commit a crime, and . . . knew [codefendant] was a member of his gang" created a reasonable inference that appellant possessed specific intent required by section 186.22].)

Next, defendants argue that there is insufficient evidence of the gang's "primary activities." Subdivision (f) of section 186.22 provides that a criminal street gang is one that has "as one of its primary activities the commission of one or more of the criminal acts" enumerated in the statute, including assault, robbery and unlawful homicide. (See also § 186.22, subd. (e)(1)-(33).) "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.) The trier of fact may look to past and present criminal activities. (*Ibid.*) Also sufficient is expert testimony, where the expert testifies he personally investigated hundreds of crimes committed by gang members and based his observations on personal experiences and information from colleagues. (*Id.* at p. 324.)

In *People v. Margarejo* (2008) 162 Cal.App.4th 102, 107, the Court of Appeal held that there was sufficient evidence to support the gang enhancement and, in particular, the statutory criteria concerning the gang's primary activities, where the gang expert testified that the gang's main activity is " 'to complete crimes,' " including murder. (*Id.* at p. 108, italics omitted.) In reaching its holding, *Margarejo* distinguished *In re Alexander L.* (2007) 149 Cal.App.4th 605, upon which Solis and Martinez also rely. In *Alexander L.*, when asked about the gang's primary activities, the gang expert

equivocated: " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' " (*Id.* at p. 611.) Then, on cross-examination, he testified that the vast majority of cases involving the gang were graffiti related. (*Id.* at p. 612.)

Unlike in *Alexander L.*, the gang expert here did not equivocate. Officer Eric Hurd laid a foundation for his testimony: he worked gang detail for the last two and one-half years and he'd "made well over 100 arrests of gang members, anywhere from possession of narcotics to firearms, and my primary assignment area is Cypress Park." He then clearly and without equivocation explained that Cypress Park's primary activities are assault with a deadly weapon, attempted murder, murder, robbery, and sales and possession of controlled substances. Officer Hurd also testified that Jose Luis Casillas was convicted of possession for sale of controlled substances; and Alfredo Melendez, Jr., was convicted of assault with a deadly weapon and brandishing a firearm to a police officer.[15] Both Casillas and Melendez were Cypress Park gang members, and Officer Hurd was personally familiar with Melendez, who self-admitted his gang membership to him.

This evidence was sufficient to satisfy the statutory criteria showing that the gang has as its primary activities one or more of the expressly numerated crimes.

2. Special circumstance allegations.

The jury also found true the gang special circumstance, which provides that any defendant found guilty of first degree murder shall be punished by death or by life in state prison without the possibility of parole if the "defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang." (§ 190.2, subd. (a)(22).) We have already more than adequately addressed why this additional contention that the evidence is insufficient to

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[15] The police officer suffered a gunshot wound to his hand.

support the jury's true findings on the special circumstances fails. But we add the following to address Solis's argument that there's inadequate evidence specifically of his active participation in Cypress Park and knowledge of the gang's criminal activity.

A person who " 'actively participates' " in a criminal street gang is one whose involvement is more than nominal or passive. (*People v. Castenada* (2000) 23 Cal.4th 743, 747 [interpreting language in section 186.22, subdivision (a)].) There is ample evidence that Solis's participation in Cypress Park was more than nominal or passive. First, there was evidence that "Cypress Park" and other gang-related statements were shouted during the incident by either Solis or his companion. Second, Solis admitted in August and September 2005—close in time to the January 2006 murders at issue—to officers that he was a Cypress Park gang member and that his moniker is Kwan. He has a gang tattoo to substantiate his admission. In his statement to detectives, he said he was walked into the gang a year before. Third, Cypress Park graffiti was found in his home.[16] Finally, guns were found in his home. This evidence is more than sufficient to sustain the true findings on the special-circumstance allegations under section 190.2, subdivision (a)(22).

II. Limiting instruction regarding the gun.

The trial court allowed the prosecutor, over Solis's objection, to argue that although the gun found in Solis's home was not the murder weapon, its presence in his home showed he had access to similar guns. Solis now contends that the admission of this evidence violated his state and federal due process and fair trial rights.

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[16] To the extent Solis argues that his *knowledge* of the gang's pattern of criminal activity is an element of the special circumstance, the case he cites, *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509, does not stand for that proposition. *Garcia* discusses the meaning of "active participation" in the context of section 186.22. It cites the defendant's current, comprehensive knowledge of what gang members were doing to show he was actively participating in the gang. (*Id.* at pp. 1510-1511.)

A. *Background.*

Forty and .44 caliber bullets or fragments were recovered from Santiago's and Mendoza's bodies. Based on rifling characteristics, the .40 caliber bullets were fired from a Smith & Wesson gun. From defendant Solis's home, officers recovered a loaded .40 caliber semiautomatic pistol with ammunition and a sawed-off shotgun. Live .40 caliber ammunition rounds also in Solis's home were stamped .40 caliber Smith & Wesson, Winchester brand. The .40 caliber bullets retrieved from the victims' bodies were *not*, however, fired from the .40 caliber gun in Solis's home, although the People's firearm expert testified "they shared the same general rifling characteristics." The firearm expert also testified that Winchester is one of a "whole bunch of makers" of .40 caliber bullets, but it is a big part of the market.

Before Solis's statement to detectives was introduced, the defense requested a limiting instruction as to what counts Solis's statements about guns referred. The trial court advised the jury to consider that evidence with respect to counts 3 and 4 only: "You are going to hear some references in the conversation regarding firearms, and I should just admonish you that that evidence can only be used and considered by you for the limited purpose of determining whether or not the evidence is sufficient to prove beyond a reasonable doubt counts 3 and 4 against defendant Solis, and it cannot be considered for any other purpose in this trial."

Later, during a discussion of the jury instructions, the prosecutor asked the trial court to allow her to argue that Solis had a connection in Highland Park from which he could get a Smith & Wesson of the particular model that was recovered. In other words, if Solis had a dealer who could provide him with that make and model, he would have access to other firearms of a similar make and model that could fire .40 caliber projectiles. The trial court replied: "Well, I don't think that you're barred from arguing that. I think that—as part of the gang mentality. [¶] And I've heard arguments in the past wherein experts have testified that gang members share guns, and make guns, firearms, easily accessible to one another, and then they get rid of the weapon, they'll

transfer it from one gang member to the other. [¶] I think you can argue in general terms that this individual, even by his own statements, if they're to be believed on the D.V.D., that he had access to individuals who could furnish weapons, including the type of weapon used in [the] alleged crime."

The prosecutor then asked if the jury would be permitted to consider the recovery of the gun from Solis's home for that purpose, and the trial court said that the jury would be permitted to infer he had a dealer who could give him weapons. Solis's defense counsel objected and argued that there was no evidence how common the gun is and the "total population of the gun in the community"; without that evidence, "it is total speculation."

During closing argument, the prosecutor discussed the search of Solis's home: "But they also found a gun, and this gun was a Smith and Wesson with a particular model number that Stella Chu testified had the same general rifling characteristics as the bullets that were recovered—or the projectiles that were recovered during the autopsies of [the victims]. [¶] Now, she was able to make a comparison with the test-fires and she said—even though she said that these, the test-fires from this gun, did not exactly match—in other words, this gun itself was not actually the firearm that fired the bullets that were then lodged inside [the victims]—she said that the general rifling characteristics were sufficiently unusual, sufficiently distinct in this particular weapon that it was a weapon of this make, a weapon of this model that actually fired the shots. [¶] And we know that defendant Solis, from his own statement—and you heard his statement, you saw him being interviewed, you heard him call that gun—'it was a beauty. I bought it from a'—'I buy my guns from a guy in Highland Park. . . .' [¶] . . . [¶] So what does it tell you that this particular gun was found in defendant Solis['s] residence? [¶] Well, it tells you that he had access to this one, brand-new, in a box, that he could pay three bills for, and it was sufficiently distinctive, sufficiently unusual, where this one came from, there are other guns of this make, there are other guns of this model, and if the defendant had access to this one, he has access to others."

Solis's defense counsel responded in closing: "From Mr. Solis's statement and from that gun, she's asking you to assume that he had a .40 caliber before and that .40 caliber was the one used in the crime, and there is no proof that he had the .40 caliber before that was used in the crime."

In rebuttal, the prosecutor added: "We know that there were .40 caliber projectiles that were fired from the same make and model of the Smith and Wesson that Solis had. We know Solis had a source, and he says, quote, 'Where I get my guns from, it was some guy from Highland Park[.]' " Defense counsel for Martinez asserted an "improper" objection, which the trial court overruled.[17] Based on defendant Solis's statement that he "just got" the .40 caliber gun in his home before his home was searched, the prosecutor suggested he got a new gun because Solis had to get rid of the one he used to kill Santiago and Mendoza.

B. *Any error in admitting evidence and argument regarding the guns found in Solis's residence outside the context of counts 3 and 4 was harmless.*

Solis makes two arguments why allowing the prosecutor to link the gun found in his home to the murders violated his state and federal due process and fair trial rights. First, the evidence and argument amounts to irrelevant and inflammatory character evidence. Second, the evidence and arguments "posed an undue risk of misuse of powerful but unfounded, unreliable, and misleading expert testimony to sustain a doubtful identification . . . ." Although Solis refers to "inflammatory character evidence," he never directly discusses Evidence Code section 1101.[18] Rather, the

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[17] It is unclear whether defense counsel was objecting to the argument or to the reference to the transcript the prosecutor gave.

[18] Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan,

"character" evidence argument is conflated with one under Evidence Code section 352.[19] In any event, we conclude that even if admission of the evidence was error, it was harmless.

A trial court has wide discretion in determining the admissibility of evidence, that is, in deciding whether the evidence is relevant and whether Evidence Code section 352 precludes its admission. (*People v. Lucas* (1995) 12 Cal.4th 415, 449; *People v. Carter* (2005) 36 Cal.4th 1114, 1166-1167.) The trial court's decision to admit evidence will not be disturbed on appeal absent an abuse of discretion.

Although not cited by the parties, *People v. Riser* (1956) 47 Cal.2d 566 (*Riser*),[20] is on point. *Riser* involved the shooting murder of two victims during a robbery. The victims were killed with a Smith and Wesson .38 Special revolver, which was never recovered. (*Id.* at p. 573.) But police did recover from the defendants, among other things, two .38 caliber guns. (*Id.* at p. 576.) Because the bullets found at the scene of the crime could *not* have been fired from the guns found in defendant's possession, the court

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knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. [¶] (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

[19] Under Evidence Code section 1101, subdivision (a), evidence a defendant committed misconduct other than that currently charged is generally inadmissible to prove he or she has a bad character or a disposition to commit the charged crime. (*People v. Kelly* (2007) 42 Cal.4th 763, 782; *People v. Kipp* (1998) 18 Cal.4th 349, 369.) But such evidence is admissible if it is relevant to prove, among other things, motive, opportunity, intent, knowledge, preparation, identity, or the existence of a common design or plan. (Evid. Code, § 1101, subd. (b); *People v. Catlin* (2001) 26 Cal.4th 81, 145.) " 'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1243.)

[20] Overruled on other grounds by *People v. Chapman* (1959) 52 Cal.2d 95, 98, and by *People v. Morse* (1964) 60 Cal.2d 631, 638.

said: "When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] *When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons*. [Citations.]" (*Riser*, *supra*, at p. 577, italics added.) Nonetheless, based on other properly admitted firearm evidence from which the jury could have concluded that the defendant possessed firearms, the erroneous admission of the guns and other related gun items was found to be not prejudicial.[21]

Since *Riser*, courts have reiterated that evidence a defendant possessed weapons not used in the commission of the offense is inadmissible where its only relevance is to show the defendant is the type of person who surrounds himself with weapons, "a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant." (*People v. Henderson* (1976) 58 Cal.App.3d 349, 360; see also *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392-1393; see generally *People v. Jablonski* (2006) 37 Cal.4th 774, 822.) Conversely, evidence of the defendant's possession of weapons is admissible when probative on issues other than the defendant's propensity to possess weapons. (*People v. Cox* (2003) 30 Cal.4th 916, 956 ["when weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible"; guns were relevant either as possible murder weapons or as weapons used to coerce the victims into defendant's car]; disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Smith* (2003) 30 Cal.4th 581, 614 ["although the ammunition and derringer were not used in the killing, '[t]heir circumstantial relevancy . . . seems clear,' and they were, . . . properly admitted"; evidence was relevant to the defendant's state of mind]; *People v. Gunder* (2007) 151 Cal.App.4th 412, 416.)

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[21] Indeed, the court noted that the defendant may have benefited from the introduction of the .38 gun, because it explained his possession of the .38 shells.

To show that Solis had access to weapons, including weapons of the type used to kill Mendoza and Santiago, the prosecutor here explained that she wanted to introduce evidence of the .40 caliber gun found in Solis's home and his statement that he bought it from a guy in Highland Park. The trial court allowed the prosecutor make this argument, and she proceeded to tell the jury that if Solis "had access to this one, he has access to others." Substantively, this is no different than saying that the defendant is the type of person who surrounds himself with weapons, a rationale rejected by *Riser* as a justification for admitting such evidence. No rationale other than one showing that Solis is the type of person who surrounds himself with weapons was offered to justify the evidence and argument, such as credibility or statement of mind. Therefore, the argument should have been precluded under *Riser.*

We nonetheless conclude that admission of the evidence and argument was harmless error, whether the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836, or *Chapman v. California* (1967) 386 U.S. 18, 24, is applied. (See, e.g., *People v. Jablonski, supra,* 37 Cal.4th at p. 823 [citing both standards of review].) We first note that it was repeatedly made clear throughout trial—by the firearms expert, the prosecutor and defense counsel—that the .40 caliber gun found in Solis's home was *not* the murder weapon. Also, the challenged evidence was admissible as to counts 3 and 4, possession of a firearm by a minor. Therefore, unlike in *Riser*, evidence that Solis kept a .40 caliber gun in his home was admissible in any event, leading to the inescapable inference or fact that defendant had access to .40 caliber weapons. The prosecutor should not have been allowed to highlight that fact outside the context of counts 3 and 4 and to draw a connection to the murder weapon; but we cannot conclude it was prejudicial error.

In so concluding, we note that there was also strong evidence that Solis was one of the shooters. Solis and Martinez were both members of Cypress Park gang; gang paraphernalia was found in Solis's home and he self-admitted his membership to police officers. Erica Beas testified that Martinez was at the party with Solis. A police officer identified Martinez from a photograph taken at the party. "Cypress" was shouted during the shootings. Before Santiago and Mendoza were shot, witnesses saw two or three men

coming down the hill carrying guns. At a live line-up, Charlyne Vivanco identified Solis as having the same hair and skin color as the shooter, and she wrote, " 'The subject in my case may be number 4,' " by which she meant No. 4 might be the person who shot Santiago. Aaron Ronquillo identified Solis at a live line-up as " '[t]he subject in my case.' " He also identified Solis as one of the shooters at the preliminary hearing. Eagan Jackson identified Solis as "maybe" one of the shooters.

Having concluded that any error was harmless, we also reject Solis's federal constitutional and ineffective assistance of counsel claims. A defendant's due process rights are not violated whenever a state court renders an erroneous evidentiary ruling. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 52-53 [such due process claims, usually citing *Chambers v. Mississippi* (1973) 410 U.S. 284, are often overbroad, as *Chambers* was a fact intensive, specific case].) Also, because we have found any error to be harmless, Solis's ineffective assistance of counsel claim fails: there is no reasonable probability that but for any error of counsel in failing to assert an objection that the outcome would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218 [a defendant claiming ineffective assistance of counsel must also show prejudice; namely, a reasonable probability that but for counsel's error, the result of the proceeding would have been different].)

III. Admission of "other crimes" and "bad character" evidence did not result in gross unfairness or the denial of a fair trial.

Solis next alludes to a "cavalcade" of other crimes and bad character evidence that was, he contends, improperly admitted at trial and resulted in "gross unfairness and denial of a fair trial." The evidence that he argues should have been excluded includes "a raft of gang testimony" and references to his booking photo and status as a juvenile probationer.[22]

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[22] Solis alludes again to admission of evidence he possessed guns not used in the crime. We have discussed that evidence above and need not repeat it.

Defendant also refers to admission of evidence of "his evasion of a police perimeter," but he doesn't discuss it; so we don't discuss it either in the context of this

First, Solis generally objects to admission of a "raft" of gang evidence and specifically to crimes committed by other Cypress Park gang members; he suggests that the gang allegations could have been bifurcated.[23] Gang enhancement and special circumstances, however, were alleged; therefore, gang evidence was generally relevant and admissible and need not have been bifurcated. (See generally, *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [trial court has discretion whether to bifurcate gang allegations]; *People v. Williams* (1997) 16 Cal.4th 153, 193 ["in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect"]; *People v. Albarran* (2007) 149 Cal.App.4th 214, 223-224, 233-238 & fn. 4 [where a gang enhancement is alleged, gang evidence is necessary to prove the enhancement] (Perluss, conc.)].) Thus, Officer Hurd's testimony about predicate crimes committed by other Cypress Park gang members—Jose Luis Casillas's conviction for possession for sale of controlled substances and Alfredo Melendez, Jr.'s conviction for assault with a deadly weapon and brandishing a firearm to a police officer—was necessary to establish an element of the enhancement. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 323.)

Solis also now objects to evidence alluding to his criminal past. A detective testified that after he received information that Solis might be a suspect, he placed Solis's photograph into a line-up and showed it to witnesses. The detective testified the six-pack was created on February 7, 2006. When asked how photographs for six-packs are selected, the detective answered: "What happens is these are booking photos. The system is run by L.A. County. Anyone who has been booked for any kind of crime in the L.A. County system . . . the booking photos are within the system." In addition to testimony about Solis's booking photo, an officer who searched Solis's home, when

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argument. (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 [failure to support an argument the citations to the record may be considered a waiver on appeal].)

[23] The opening brief does not cite specific testimony or to the reporter's transcript to aid the court in identifying what specific testimony was objectionable.

asked how he knew that a certain room belonged to Solis, replied, "It was through the—his probation officer, Mr. Tim Brown, and his mother."

These references could suggest that Solis had a criminal past. But no objections were asserted to this testimony; therefore, the issue has not been preserved for review. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) Notwithstanding the absence of objections to the challenged evidence, we conclude that any error in its admission was harmless. The references to Solis's booking photo and probation officer were relatively brief. As to the six-packs, there was no direct statement that Solis's photo in the six-pack was a booking photo. Also, we have discussed above in Discussion, Section II, the evidence against Solis in the context of a harmless error analysis and need not repeat it here.[24]

IV. Admission of Martinez's statement did not violate Solis's confrontation rights.

Solis contends that the admission of statements his codefendant, Martinez, made to a detective violated his due process and confrontation rights, citing *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518; and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

A. *Additional facts.*

Detective Rivera interviewed defendant Martinez. During the interview, the detective's strategy was to get Martinez to admit his involvement in the crimes by suggesting that Martinez was defending himself against attack: "[T]here was some other dudes there that were shooting. Okay? But nobody's saying that you shot. You understand me?" The detective suggested that "somebody came and tried to help you" and "this other dude" went crazy and started shooting. The detective didn't know who this dude was, and Martinez said he didn't know either.

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[24] Similarly, because we conclude that any error in admitting the evidence was harmless, Solis's ineffective counsel claim, based on trial counsel's failure to object and request a mistrial, fails.

"DETECTIVE RIVERA: . . . [¶] Whoever it was that came to try [and] help you, man. I don't know if it was one of your homeboys. I don't know if it was just–

"ISAAC MARTINEZ: I'm telling you I –

"DETECTIVE RIVERA: Hey, listen. But I don't know if it was a homeboy. I don't know if it's just some – one of the dudes at the party that was coming out to try [and] help you. That could [have] been it. But I need to be able to explain it, man. . . .

"ISAAC MARTINEZ: Or there's probably someone else at the party, no? But other than that – so I don't know.

"DETECTIVE RIVERA: I understand. Do you know who it was that was shooting into the car?

"ISAAC MARTINEZ: I don't know. They probably came and help me."

Later, the detective asked:

"DETECTIVE RIVERA: . . . Do you know who this other dude was that was there trying to help you?

"ISAAC MARTINEZ: No.

"DETECTIVE RIVERA: And I only think he was trying to help you. I'm not even sure. Do you know who the other dude is?

"ISAAC MARTINEZ: I – fuck, . . . he saved my life, fool.

"DETECTIVE RIVERA: He saved your life? You think if he – if this dude wouldn't of shot, they would of got at you or what?

"ISAAC MARTINEZ: Hell yeah.

"DETECTIVE RIVERA: Yeah?

"ISAAC MARTINEZ: That's why I was thankful that somebody, like, damn, looking out for me or something, cause otherwise I wouldn't of been here."

Before the jury heard defendants' statements to detectives, the trial court instructed them with CALJIC No. 2.08, and the court repeated that instruction before deliberations began.[25]

B. *Admission of Martinez's statement did not violate Solis's confrontation rights.*

The federal and state constitutions guarantee a criminal defendant the right to confront and cross-examine witnesses against him or her. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15.) Admission of a nontestifying codefendant's confession at a joint trial is governed by *Bruton, supra*, 391 U.S. 123, and its progeny. *Bruton* held that a defendant's Sixth Amendment confrontation rights are violated by the admission of a nontestifying codefendant's confession that implicates the defendant, even if the jury is given a limiting instruction to disregard the confession when determining the nondeclarant defendant's guilt or innocence. (*Id.* at pp. 135-136.)

But "the Confrontation Clause is *not* violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Richardson v. Marsh* (1987) 481 U.S. 200, 211, italics added, fn. omitted.) In *Richardson*, Marsh and Williams were jointly tried for, among others, murder. Williams's confession was admitted at trial, but it was redacted to omit all references to

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[25] The jury was instructed: "Evidence has been admitted against one of the defendants and not admitted against the other. [¶] At the time this evidence was admitted, you were instructed that it could not be considered by you against the other defendant. [¶] Do not consider this evidence against the other defendant."

"Evidence has been received of a statement made by a defendant after his arrest. [¶] At the time the evidence of this statement was received, you were instructed that it could not be considered by you against the other defendant. [¶] Again, do not consider the evidence of this statement against the other defendant."

"Certain evidence was admitted for a limited purpose. [¶] At the time that this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

Marsh; in fact, it was redacted to omit any indication that anyone other than Williams and a third suspect had participated in the crimes. (*Id.* at pp. 203-204.) When the confession was admitted, the jury was admonished not to use it against Marsh. Marsh testified, and her testimony placed her at the scene of the crime, although she denied knowing anyone would be robbed or harmed. The United States Supreme Court held that the admission of Williams's confession did not violate *Bruton*. It reasoned that a confession not incriminating on its face and that becomes so only when linked with evidence introduced at trial does not violate a defendant's confrontation rights. (*Id.* at p. 208.) "Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that 'the defendant helped me commit the crime' is more vivid than inferential incrimination, and hence more difficult to thrust out of mind." (*Ibid.*) Thus, the Confrontation Clause is not violated by admission of a confession redacted to eliminate not only the defendant's name but any reference to his or her existence. (*Id.* at p. 211.)

Our California Supreme Court interpreted *Richardson v. Marsh, supra,* 481 U.S. 200 in *People v. Fletcher* (1996) 13 Cal.4th 451. In *Fletcher*, codefendant's statement that he "and a friend" were trying to commit robberies when a woman drove by and he shot at her was introduced at a joint trial. (*Fletcher,* at p. 458.) *Fletcher* first noted that the *Bruton* rule "extends only to confessions that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant defendant." (*Id.* at pp. 455-456.) The court then held that admission of the redacted confession violated the defendant's confrontation rights; but the court also noted that the sufficiency of editing a nontestifying codefendant's statement to substitute pronouns or neutral terms for the defendant's name for the purposes of the Confrontation Clause must be determined on a case-by-case basis, in light of the statement as a whole and the other evidence presented at trial. (*Id.* at p. 468; see also *Gray v. Maryland* (1998) 523 U.S. 185, 195 ["[C]onsidered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton's* unredacted confessions as to warrant the same legal results"].)

Fletcher also states that "a confession that is redacted to substitute pronouns or similar neutral and nonidentifying terms for the name of a codefendant will be sufficient if the codefendant was just one of a large group of individuals any one of whom could equally well have been the coparticipant mentioned in the confession." (*People v. Fletcher*, *supra,* at p. 466.)

Under this line of authority, Martinez's statement was not made inadmissible by the *Bruton* line of cases. That line of cases does not refer to just any and every type of statement made by a defendant. They refer to "confessions" or to statements that somehow implicate the codefendant in the crime; hence, our California Supreme Court in *Fletcher* pointed out that the *Bruton* rule "extends only to confessions that are not only 'powerfully incriminating' but also 'facially incriminating' of the nondeclarant defendant." (*People v. Fletcher, supra,* 13 Cal.4th at pp. 455-456.)

Martinez's statement does not incriminate Solis, either "powerfully" or "facially." Rather, Martinez admitted he was at the party, but he denied going to the party with anyone or "meeting up" with anyone, other than Erica Beas, once there. Also, it was the detective—not Martinez—who introduced the concept of another "dude" or guy who was shooting. Martinez never identified this other person as Solis. Instead, Martinez repeatedly denied knowing who this other person was. In fact, he didn't comment on this other person other than to say he probably saved his, Martinez's, life. To the extent, if any, the statement implicates Solis, it only does so when linked with evidence introduced at trial: for example, Solis and Martinez are Cypress Park gang members; Solis was seen at the party with Martinez; a fight erupted that involved possibly numerous participants; witnesses saw two to three men coming down the hill with guns; and several witnesses identified Solis as possibly being one of the shooters. Where, as here, a nonincriminating statement becomes so when linked with other evidence, a defendant's confrontation rights are not violated. (*Richardson v. Marsh*, *supra*, 481 U.S. at p. 208.)

Although the opening brief focuses on the *Bruton* issue, it also cursorily refers to *Crawford, supra,* 541 U.S. 36. Neither the opening nor respondent's brief discuss it. In *Crawford*, the United States Supreme Court held that testimonial out-of-court statements,

such as ones elicited during a police interrogation, must be excluded under the Confrontation Clause unless the witness is unavailable and there was a prior opportunity for cross-examination. (*Id*. at p. 53.) To the extent admission of Martinez's statement implicates *Crawford*, any error in admitting it was harmless. (See generally, *People v. Song* (2004) 124 Cal.App.4th 973, 984 [*Crawford* error is reviewed under the *Chapman* test].) As we have said, the statement did not incriminate Solis and the jury was instructed to consider the statement against Martinez only.[26]

V. Aiding and abetting instructions

Both shooters struck the victims. As a theory of murder, the jury was therefore instructed on aider and abettor liability. Defendants contend that these instructions contained errors, which deprived them of their federal and state rights to due process and to a fair trial.[27] We address each contention in turn.

A. *Any error resulting from giving CALJIC No. 3.00 was harmless.*

Solis's and Martinez's first contention is that the aider and abettor instructions failed to inform the jury that they did not have to be found guilty of the same degree of murder; in other words, one could be found guilty of a lesser offense.

We first have no problem with the proposition that principals in a crime need not be found guilty of the same offense.[28] Rather, this proposition flows from the Supreme Court's decision in *People v. McCoy* (2001) 25 Cal.4th 1111. In that case, the court took note of the two types of aider and abettor liability: (1) An aider and abettor with the necessary mental state is guilty of the intended crime (also called "direct" or "straight"

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[26] Because we have found no error or harmless error in admitting Martinez's statement, Solis's ineffective assistance of counsel claim fails, as does his claim that the trial court had a sua sponte duty to declare a mistrial.

[27] Martinez and Solis have arguably forfeited this issue on appeal by failing to object to the instructions or to request modifications in the trial court. We will, however, address the issue.

[28] The Attorney General's position on this proposition is unclear, but the Respondent's Brief does not argue to the contrary.

aider and abettor liability); and (2) an aider and abettor is guilty not only of the intended crime, but of any other offense that was a natural and probable consequence of the crime aided and abetted. At issue in *McCoy* was direct aider and abettor liability. Discussing that type of liability only, the court concluded that an aider and abettor could be found guilty of an offense *greater* than that committed by the direct perpetrator. The Court of Appeal in *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165, found that *McCoy*'s reasoning "leads inexorably to the further conclusion that an aider and abettor's guilt may also be *less* than the perpetrator's, if the aider and abettor has a less culpable mental state." (Italics added.) Because *McCoy*'s conclusion rests on an examination of each individual actor's mens rea, we agree with *Samaniego*.

As to the second type of aider and abettor liability under the natural and probable consequences doctrine, an aider and abettor may be found guilty of a lesser offense than a direct perpetrator under that theory of liability as well. (*People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*); *People v. Hart* (2009) 176 Cal.App.4th 662.) In *Woods*, defendants Windham and Woods set out to find a rival gang member. Woods shot two men. At Windham's and Woods' joint trial, the prosecution's theory was Windham aided and abetted Woods, the direct perpetrator. The trial court instructed the jury on, among other things, murder in the first and second degree. The jury was also instructed on aider and abettor liability, including liability under the natural and probable consequences doctrine, namely, CALJIC Nos. 3.00, 3.01 and 3.02. During deliberations, the jury asked if an aider and abettor can be found guilty of second degree murder if the actual perpetrator was found guilty of first degree murder. (*Woods*, at p. 1579.) The court told the jury, " 'No.' " The jury found both defendants guilty of first degree murder.

Windham argued that the trial court misinstructed the jury. The Court of Appeal agreed. It said that "in determining aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser

offense was such a consequence[,]" otherwise, the jury would be given the all or nothing choice of either convicting the aider and abettor of the same crime as the direct perpetrator or of acquitting him, though guilty of a lesser offense. (*Woods, supra,* 8 Cal.App.4th at p. 1588.) Thus, a trial court has a sua sponte duty to instruct on a necessarily included offense if the evidence would support such a finding, but there is no such duty if the evidence establishes that the aider and abettor, if guilty at all, is guilty of something beyond the lesser offense. (*Id.* at p. 1593; see also *People v. Blackwood* (1939) 35 Cal.App.2d 728, 733 ["We do not believe that the rule that the two principals are equally guilty is so inflexible that a jury might not find them guilty of different degrees of crime even though they are tried jointly. For the evidence against them is not necessarily precisely the same"].)

Here, defendants argue that the instructions precluded the jury from finding one or both of them guilty of something less than first degree murder. The jury was instructed on aider and abettor liability with CALJIC Nos. 3.00,[29] 3.01,[30] and 3.02 (aider and abettor liability under the natural and probable consequences doctrine).[31] Defendants point

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[29] "Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. [¶] Principals include: [¶] 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission or attempted commission of the crime." (CALJIC No. 3.00.)

[30] "A person aids and abets the commission or attempted commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator; [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and; [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime." (CALJIC No. 3.01.)

[31] "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted. [¶] In order to find the defendant guilty of the crimes of Murder and Attempted Murder, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crimes of Murder and/or Attempted Murder were committed; [¶] 2. That the defendant aided and abetted those crimes; [¶]

specifically to CALJIC No. 3.00 as problematic. It states: "Each principal, regardless of the extent or manner of participation is equally guilty." The "equally guilty" language in CALJIC No. 3.00 sets out the basic, introductory principle that both actual perpetrators and those who merely aid and abet the commission of a crime are deemed to be principals under California law. (§ 31.)

Although we, like the *Samaniego* court are critical of CALJIC No. 3.00, its potential to mislead must be considered in conjunction with the other instructions as a whole and in the context of the case. We therefore first note that the instruction does *not* state that the actual perpetrator and the one who aids and abets the commission of the crime *must be found guilty of the same offense*. In addition, the jury was instructed on second degree murder with, among others, CALJIC Nos. 8.30 (unpremeditated murder of the second degree)[32] and 8.70.[33] The jury was also instructed that each count was a

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3. That a co-principal in that crime committed the crimes of Murder and/or Attempted Murder; and [¶] 4. The crimes of Murder and/or Attempted Murder were a natural and probable consequence of the commission of the crimes of Murder and/or Attempted Murder. [¶] In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen. [¶] You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crime of Murder and/or Attempted Murder was a natural and probable consequence of the commission of that target crime." (CALJIC No. 3.02.)

[32] "Murder of the second degree is also the unlawful killing of a human being with malice aforethought when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation."

[33] "Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree."

distinct crime that must be decided separately. "The defendant may be found guilty or not guilty of any or all of the crimes charged." (CALJIC No. 17.02.)

Nothing in this case suggests that the jury failed to understand that they could convict either defendant of something less than first degree murder. In *Woods*, the jury specifically asked whether they could convict the aider and abettor of a lesser offense than the direct perpetrator and were told "no," they could not. The jury here never asked such a question or indicated it was confused on the point. The error in *Woods* thus did not arise from instructing the jury with CALJIC No. 3.00. It arose from the trial court expressly prohibiting the jury from finding the aider and abettor guilty of second degree murder if they found the direct perpetrator guilty of first degree murder.

Moreover, any instructional error with respect to aider and abettor liability was harmless under the standard in *Chapman v. California, supra,* 386 U.S. 18. (See generally, *People v. Samaniego, supra,* 172 Cal.App.4th at p. 1165 [applying the *Chapman* standard of review].) The jury was instructed that to find the gang special circumstance true (§ 190.2, subd. (a)(22)), it had to find that the "defendant intentionally killed the victim." (CALJIC No. 8.81.22.) The jury found the special circumstance true as to both Martinez and Solis; therefore, the jury necessarily found that defendants acted with the requisite mental states. In addition, the jury found the premeditation and deliberation allegations true as to each defendant; this also demonstrates the jury necessarily found that each defendant intended to kill.

Finally, the facts of this case simply do not lend themselves to a finding of prejudicial error, based on the unlikelihood that either of the defendants were guilty of something less than first degree murder. The evidence was that both of the men shot the victims multiple times. At least two men were seen coming down the hill. Two types of bullets were found in the victims' bodies. The man wearing the jersey (Martinez) pointed

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The jury was also instructed with CALJIC Nos. 8.71 (doubt whether first or second degree murder), 8.74 (Unanimous agreement as to offense—first or second degree murder or manslaughter), and 8.75 (Jury may return partial verdict—homicide).

his gun at Cardines's head and several other witnesses saw the other man (Solis) shoot into Eagan Jackson's car.

B. *The jury was adequately instructed on the natural and probable consequences doctrine as a theory of aider and abettor liability.*

Defendants also argue that the jury was not instructed it could find them guilty of second degree murder under the natural and probable consequences doctrine. CALJIC No. 3.02, however, did not preclude that outcome. The instruction refers to "Murder" and "Attempted Murder." It does not refer to degree or somehow preclude finding either defendant guilty of second degree murder; therefore it was wholly unnecessary to specify that first degree or second degree murder was a natural and probable consequence of the target crimes.

As we have said, this case is not like *People v. Woods, supra*, 8 Cal.App.4th at page 1588, where the jury was given "the all or nothing choice" of either convicting the aider and abettor of the same crime as the direct perpetrator or of acquitting him, though guilty of a lesser offense. The jury here was given no such impermissible all-or-nothing choice. Rather, it was instructed on the definitions of first degree murder (CALJIC No. 8.20) and on second degree murder (CALJIC No. 8.30). CALJIC No. 8.70 instructed the jury it had to determine where the murder was in the first or second degree and so state the finding in the verdict. Any doubt as to the degree of murder had to be resolved in the defendant's favor (CALJIC No. 8.71). The jury had to reach unanimous agreement whether the defendant was guilty of first or second degree murder (CALJIC No. 8.74). Finally, CALJIC No. 8.75 informed the jury of their duty "to determine whether the defendant is guilty or not guilty of murder in the first degree or of any lesser crime thereto."

Next, defendants attack the instructions because they allegedly do not inform the jury that "the objective foreseeability determination is (1) to be based upon a reasonable person *in the defendant's position* and (2) [it] may only consider those facts *known* to the defendant." Defendants are correct that "whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant

requires application of an objective rather than subjective test." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) Thus, the issue depends not on defendant's subjective state of mind but "whether, under all of the circumstances presented, a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Ibid.*)

CALJIC No. 3.02 conforms to this rule of law. It states: "In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen." The jury was therefore adequately informed of the objective nature of the foreseeability determination.

VI. Flight.

Solis's defense counsel objected to evidence his client ran from the police. Counsel argued that there was no indication regarding why Solis was running: he could have been running because there was a warrant out for his arrest related to gun charges pending in juvenile court as opposed to the charges in this case. The court overruled the objections, and detectives testified that Solis avoided capture twice, once about one week before April 16, 2006 and on April 16.

During closing argument, the prosecutor argued that flight after a crime is circumstantial evidence of consciousness of guilt: "So, in this case, what's the flight? [¶] Well, we have the flight of both defendants immediately after the shootings, we have the flight of defendant Juan Solis approximately a week before he was arrested, and we have the flight of defendant Juan Solis actually on the night of his arrest." Solis's counsel objected, "That's improper rebuttal," but the objection was overruled. The trial court

instructed the jury with CALJIC No. 2.52, Flight After Crime.[34] Both defendants now contend that giving the flight instruction was prejudicial error.[35]

As to Solis, he argues that there was no evidence that he fled because of a consciousness of guilt related to the shootings as opposed to an outstanding juvenile warrant. As to Martinez, he notes he is in a different position; the only flight allegation as to him was he fled the scene of the crime. Solis's argument that the existence of an alternative explanation for his flight precludes giving the flight instruction is incorrect.[36] Our California Supreme Court has found that the flight instruction adequately conveys the concept that if flight is found, the jury is allowed to consider alternative explanations for a defendant's flight, other than consciousness of guilt. (*People v. Avila* (2009) 46 Cal.4th 680, 710-711; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

Defendants also argue that the instruction forced an inference of guilt. Our California Supreme Court has rejected this and defendants' other arguments. (*People v. Mendoza* (2000) 24 Cal.4th 130, 179-181 [flight instruction does not violate federal due process, does not constitute an improper pinpoint instruction, does not direct the jury to make only one inference, and does not lessen the prosecution's burden of proof]; see also *People v. Avila, supra,* 46 Cal.4th at p. 710 ["a flight instruction does not create an unconstitutional permissive inference or lessen the prosecutor's burden of proof, and is proper even when identity is at issue"]; *People v. Visciotti* (1992) 2 Cal.4th 1, 60-61 [a defendant's flight immediately following the crime reflects a consciousness of guilt and

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[34] "The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

[35] It does not appear that defendants objected to the instruction and they do not cite to such an objection in the record. We will address the issue nonetheless.

[36] The alternative explanation—there was an unrelated warrant out for Solis—was not, it appears, firmly before the jury, although, as we have discussed, they were informed Solis had a probation officer.

the instruction leaves the factual determination whether flight was established and its significance to the jury].)

VII. Instruction on the gang special circumstance.

Defendants contend that the trial court failed to instruct the jury on the intent to kill element of the gang special circumstance, thereby depriving them of due process of law by reducing the prosecutor's burden of proof and by denying them a fair trial and a right to a jury determination on all issues beyond a reasonable doubt.

Section 190.2 lists 22 special circumstances, which, if found true by the jury, expose the defendant to the penalty of death or imprisonment without the possibility of parole. Not all of the 22 special circumstances, however, require the actual killer to have an intent to kill to suffer the consequences of prescribed penalties. (§ 190.2, subd. (b).) For example, the multiple murder special circumstance (*id.*, subd. (a)(3)) does *not* require the defendant to have an intent to kill, but the gang special circumstance (*id.*, subd. (a)(22)) does. Defendants were charged with and found guilty of both of these special circumstances.

The problem is that the jury was given the introductory instruction to special circumstances, CALJIC No. 8.80,[37] but the trial court failed to edit it properly and

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[37] "If you find a defendant in this case guilty of murder of the first degree, you must then determine if one or more of the following special circumstances are true or not true: Multiple murder and that the killing occurred while the defendant was an active participant in a criminal street gang and the murders were carried out to further the activities of the criminal street gang. [¶] The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true. [¶] If you find beyond a reasonable doubt that the defendant was either the actual killer or an aider or abettor, but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant with intent to kill aided and abetted an actor in commission of the murder in the first degree, in order to find the special circumstance to be true. On the other hand, if you find beyond a reasonable doubt that the defendant was the actual killer, you need not find that the defendant intended to kill a human being in order to find the special circumstance to be true. [¶] You must decide separately as to each of the defendants the existence or nonexistence of each special circumstance alleged in this case. If you cannot agree as to all the defendants, but can agree as to one or more of them, you make your

counsel failed to catch the error. The instruction states in part: "If you find beyond a reasonable doubt that the defendant was either the actual killer or an aider or abettor, but you are unable to decide which, then you must also find beyond a reasonable doubt that the defendant with intent to kill aided and abetted an actor in commission of the murder in the first degree, in order to find the special circumstance to be true. *On the other hand, if you find beyond a reasonable doubt that the defendant was the actual killer, you need not find that the defendant intended to kill a human being in order to find the special circumstance to be true.*" (Italics added.) Insofar as this language could be read to apply to the gang-special circumstance instruction, it is in error, because that special circumstance requires an intent to kill.

The error, however, was harmless. The jury was also instructed specifically with CALJIC No. 8.81.22 (special circumstances—intentional killing by active street gang member).[38] That instruction expressly informs the jury that to find the gang special

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finding as to the one or more upon which you do agree. You must decide separately each special circumstance alleged in this case as to each of the defendants. If you cannot agree as to all of the special circumstances, but can agree as to one or more of them, you must make your finding as to the one or more upon which you do agree. [¶] In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously. [¶] You will state your special finding as to whether the special circumstance is or is not true on the form that will be supplied.

[38] "To find that the special circumstance 'intentional killing by an active street gang member' is true, it must be proved: [¶] 1. *The defendant intentionally killed the victim;* [¶] 2. At the time of the killing, the defendant was an active participant in a criminal street gang; [¶] 3. The members of that gang engaged in or have engaged in a pattern of criminal gang activity; [¶] 4. The defendant knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and [¶] 5. The murder was carried out to further the activities of the criminal street gang. [¶] 'Criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, (1) having as one of its primary activities the commission of one or more of the following criminal acts, murder, attempted murder, assault with a firearm and/or narcotic possession or sales, (2) having a common name or common identifying sign or symbol, and (3) whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. [¶] The phrase 'primary activities,' as used in this allegation, means that the commission of one or more of the crimes identified in the

circumstance true, it must be proved that "[t]he defendant intentionally killed the victim." Given that CALJIC No. 8.81.22 contained the intent to kill requirement, it is not reasonably likely that the jury applied the ambiguous instruction in a manner that violates the Constitution. (See generally, *People v. Clair* (1992) 2 Cal.4th 629, 663.)

VIII. The instruction on motive.

Martinez, joined by Solis, contends that under the circumstances of this case it was prejudicial error to instruct the jury with CALJIC No. 2.51, motive.

The jury was instructed on motive as follows: "Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish the defendant is guilty. Absence of motive may tend to show the defendant is not guilty." Defendants argue that where, as here, a gang special circumstance (§ 190.2, subd. (a)(22)) and gang enhancements (§ 186.22, subd. (b)(1)), are charged, the jury could have construed the motive instruction in a manner that lightened the prosecution's burden of proof to show that the murders were committed to further the activities of a criminal street gang. In other words, to establish the special circumstance and gang enhancement,

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allegation, be one of the group's 'chief' or 'principal' occupations. This would of necessity exclude the occasional commission of identified crimes by the group's members. In determining this issue, you should consider any expert opinion evidence offered, as well as evidence of the past or present conduct by gang members involving the commission of one or more of the identified crimes, including the crimes charged in this proceeding. [¶] 'Pattern of criminal gang activity' means the conviction of two or more of the following crimes, namely, Assault with a Firearm on a Peace Officer ([Pen. Code, §] 245[,] [subd.] (d)(1)) and Possession for Sale of a Controlled Substance, including Methamphetamine, PCP, and Cocaine Base, in violation of [Health and Safety Code sections] 11378, 11378.5 and 11351.5, provided at least one of those crimes occurred after September 26, 1988 and the last of those crimes occurred within three years after a prior offense, and the crimes are committed on separate occasions, or by two or more persons. [¶] Active participation means that the person must have a relationship with the criminal street gang that is more than in name only, passive, inactive or purely technical. [¶] When a defendant intends to kill a certain person, but by mistake or inadvertence kills a different person, the defendant is deemed to have intentionally killed the victim, regardless of his identity as the intended victim." (Italics added.)

the crime had to be motivated by gang-related reasons; hence, the instruction that motive "need not be shown" is contradictory and misleading.

This issue was recently considered in *People v. Fuentes* (2009) 171 Cal.App.4th 1133 (*Fuentes*). There, as here, the defendant was charged with special circumstance murder under section 190.2, subdivision (a)(22), and with gang enhancements under section 186.22, subdivision (b)(1). The trial court instructed the jury with CALCRIM No. 370,[39] which is substantively the same as CALJIC No. 2.51. Fuentes argued that the motive instruction conflicted with the instructions on the gang enhancement and special circumstance, thereby lessening the prosecution's burden of proof. (*Fuentes*, at p. 1139.) There, as here, the special circumstance instruction stated that it must be proved that " 'the murder was carried out to further the activit[ies] of the criminal street gang.' " (*Ibid.*; see also fn. 39, *ante*.) The jury was instructed as to the gang enhancement that an essential element was the crimes were "committed with the specific intent to promote, further, or assist in any criminal conduct by gang members."

Fuentes took note of the "superficial attractiveness" of the argument that the motive instruction undercut the gang and special enhancement instructions. "Any reason for doing something can rightly be called a motive" and there are "reasons that stand behind other reasons." (*Fuentes*, *supra*, 171 Cal.App.4th at p. 1140.) The instructions, however, "[b]y listing the various 'intents' the prosecution was required to prove (the intent to kill, the intent to further gang activity), while also saying the prosecution did not have to prove a motive, . . . told the jury where to cut off the chain of reasons." (*Ibid.*) *Fuentes* thus rejected the notion that the motive instruction contradicts the other instructions. "An intent to further criminal gang activity is no more a 'motive' in legal terms than is any other specific intent. We do not call a premeditated murderer's intent to kill a 'motive,' though his action is motivated by a desire to cause the victim's death.

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[39] It states: " 'The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may however consider whether the defendant had a motive. Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.' " (*Fuentes*, *supra*, 171 Cal.App.4th at p. 1139.)

Combined, the instructions here told the jury the prosecution must prove that Fuentes intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the jury could not understand it." (*Fuentes*, 171 Cal.App.4th at pp. 1139-1140.)

In so holding, *Fuentes* distinguished *People v. Maurer* (1995) 32 Cal.App.4th 1121, which Martinez also relies on here. In *Maurer*, the defendant was charged with violations of section 647.6, and the jury was instructed that " '[s]uch acts or conduct [must be] motivated by an unnatural or abnormal sexual interest" in the victim. (*Maurer*, at p. 1125.) The jury was also instructed on motive in general under CALJIC No. 2.51. "In this context, the question whether 'motive' is somehow different from 'motivation' or 'motivated by' is a question of some academic interest but of little practical significance. One instruction told the jurors here that 'the following element [ ] must be proved: . . . Such acts or conduct were motivated by an unnatural or abnormal sexual interest in [K.V.].' Another instruction told the jurors that '[m]otive is not an element of the crime charged and need not be shown.' We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) The *Maurer* court therefore found it was error to instruct the jury with CALJIC No. 2.51.

Maurer, however, is a self-described "strange beast." It depends on a peculiarity in the definition of the offense which did not "tell the jury where to cut off the chain of reasons for the defendant's action which the prosecution had to prove." (*Fuentes, supra,* 171 Cal.App.4th at p. 1140.) Unlike here, the difference between " 'motive' " and " 'intent' " were made clear to the reasonable juror. (See generally, *People v. Wilson* (2008) 43 Cal.4th 1, 21-22; *People v. Snow, supra,* 30 Cal.4th 43, 98 [no reasonable possibility of confusion because CALJIC No. 2.51 refers to " 'the crime charged,' " and not to an enhancement]; *People v. Cash* (2002) 28 Cal.4th 703, 738 ["motive is the 'reason a person chooses to commit a crime,' but it is not equivalent to the 'mental state such as intent' required to commit the crime"].) No error therefore occurred by instructing the jury with CALJIC No. 2.51.

IX. Cumulative error.

Solis contends that the cumulative effect of the purported errors undermined the fundamental fairness of the trial. As we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial[,] [w]e reach the same conclusion with respect to the cumulative effect of any [purported] errors.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236.)

X. Sentencing issues.

A. *The trial court did not abuse its discretion in imposing LWOP.*

Because Martinez and Solis were between the ages of 16 and 18 at the time of the murders, the trial court had the discretion to sentence them to life without the possibility of parole or to 25 years to life.[40] (§ 190.5, subd. (b).) Finding "no good reason" to exercise its discretion to impose the more lenient sentence, the court sentenced them to life without the possibility of parole on counts 1 and 2. Defendants now contend that the court abused its discretion. We disagree.

In imposing the LWOP sentence, the trial court cited *People v. Guinn* (1994) 28 Cal.App.4th 1130. *Guinn* states: "In the first instance, therefore, LWOP is the presumptive punishment for 16- or 17-year old special-circumstance murderers, and the court's discretion is concomitantly circumscribed to that extent." (*Id.* at p. 1142.) Nothing in the record shows that the trial court was mistaken about its discretion to impose a 25-years-to-life sentence in lieu of LWOP. Indeed, the court expressly referred to its "discretion" but found no " 'good reason' " to exercise it. Also, the prosecutor's sentencing memorandum argued that there was no " 'good reason' " to sentence defendants to the more lenient term.

We also reject defendant's argument that section 190.5 is unconstitutional because it is arbitrary and vague; that argument was also considered and rejected by *Guinn*, which refused to ascribe an "absurd, unjust, capricious and arbitrary intent to the enactment." (*People v. Guinn, supra,* 28 Cal.App.4th at p. 1143.)

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[40] The parties stipulated that at the time the crimes were committed in 2006, Martinez and Solis were less than 18 years of age.

B. *Cunningham*

To preserve any federal claims he may have, Solis contends that unstayed and consecutive terms imposed violate his rights to due process and a jury trial under *Cunningham v. California* (2007) 549 U.S. 270, and *Blakely v. Washington* (2004) 542 U.S. 296. Those contentions have been rejected by our California Supreme Court in *People v. Black* (2007) 41 Cal.4th 799, 820-823, and by the United States Supreme Court in *Oregon v. Ice* (2009) 555 U.S. __ [129 S.Ct. 711, 718-719, 172 L.Ed.2d 517.]

C. *Imposition of a concurrent term on count 4.*[41]

Solis was found guilty of counts 3 and 4, possession of a firearm by a minor (§ 12101, subd. (a)(1)), and sentenced to a two-year term plus three years for the gang enhancement. The court sentenced him to a concurrent five-year term (two years for the offense and three years for the gang enhancement) on count 4. Solis now contends that the concurrent term on count 4 should have been stayed under section 654.[42]

Section 654, subdivision (a), provides in pertinent part, "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "Section 654 therefore ' "precludes multiple punishment for a single act or for a course of conduct comprising indivisible acts. 'Whether a course of criminal conduct is divisible . . . depends on the intent and objective of the actor.' [Citations.] '[I]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.' [Citation.]" [Citation.]' " (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see also *People v. Lewis* (2008) 43 Cal.4th 415, 519; *People v. Martin* (2005) 133 Cal.App.4th 776, 781.) If the defendant, however, harbored multiple or simultaneous objectives, independent of and not merely incidental to each other, he or she " 'may be

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41 It does not appear that Martinez joins this contention.

42 Whether concurrent sentences may be imposed for possession of multiple firearms is currently on review in our Supreme Court. (*People v. Correa* (July 9, 2008) S163273.)

punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Martin, supra,* at p. 781.) The statute's purpose is to ensure the defendant's punishment will be commensurate with his or her liability. (*People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1044.)

Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Jones, supra*, 103 Cal.App.4th at p. 1143.) "A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence. [Citation.]" (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence. (*People v. Jones, supra*, at p. 1143; *People v. Akins* (1997) 56 Cal.App.4th 331, 339.)

Section 12101, subdivision (a)(1), states: "A minor shall not possess a pistol, revolver, or [any] other firearm capable of being concealed upon the person." In *People v. Kirk* (1989) 211 Cal.App.3d 58, 65-66, the court analyzed a similar statute, section 12021, which prohibits possession of a firearm by a felon. *Kirk* held that the defendant could not be convicted of multiple violations of possession of a sawed-off shotgun for his contemporaneous possession of two such weapons. In response to *Kirk*, the Legislature added subdivision (k) to section 12001, which provides that for the purposes of, among others, sections 12021 and 12101 "notwithstanding the fact that the term 'any firearm' may be used in those sections, each firearm or the frame or receiver of the same shall constitute a distinct and separate offense under those sections."

Although each gun a minor possesses therefore constitutes "a distinct and separate offense" (§ 12001, subd. (k)), separate sentences for each gun must nonetheless be supported by substantial evidence of independent criminal objectives. There is some evidence of such objectives here. The two firearms found in Solis's residence were a sawed-off shotgun that was concealable and a .40 caliber gun. Solis gave a statement to

detectives about his objectives in possessing the weapons. He said he bought the .40 caliber gun from a guy in Highland Park because sometimes at night he doesn't feel safe. The shotgun, however, he ambiguously said, "was already there." From this vague statement, the court could have inferred that Solis had a different criminal objective in possessing the sawed-off shotgun.

We therefore conclude that substantial evidence supports the imposition of a concurrent sentence on count 4.

D. *Gang enhancements were alleged on the firearm counts*.

Solis contends that imposition of sentence on the gang enhancements as to counts 3 and 4 was unauthorized because the enhancements were never alleged. The information does, however, allege—albeit in an odd location (under count 7)—that "pursuant to Penal Code section 186.22[,] [subdivision] (b)(1)(A) as to count(s) 3, 4, 5, 6 and 7 that the above offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members." The information summary also lists the gang enhancement as to counts 3 and 4.

E. *The parole revocation fine.*

Next, both defendants contends that the $10,000 parole revocation fine (§ 1202.4, subd. (b)) imposed was unauthorized because they were sentenced to life without the possibility of parole.[43]

Penal Code section 1202.45 provides, in pertinent part: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section

[43] We first note that it is a little unclear what exactly the trial court imposed. At the sentencing hearing, the court said: "Each defendant shall pay a restitution fine of $10,000, pursuant to [section] 1202.4(b), and the court will order that they each pay an additional restitution of $7,500 for funeral and burial expenses. Each defendant shall pay a parole revocation restitution fine of $200, but the court will stay that." The minute orders and abstracts of judgment state that a $10,000 restitution fine and a $10,000 parole revocation fine were imposed.

1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine . . . shall be suspended unless the person's parole is revoked."

People v. Jenkins (2006) 140 Cal.App.4th 805, 819, held that a parole revocation fine may not be imposed for a term of life in prison without the possibility of parole, because section 1202.45 is inapplicable where there is no period of parole. The *Jenkins* court relied on *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183. *Oganesyan* rejected the argument that where there are two sentences—life without the possibility of parole for special circumstance murder and an indeterminate sentence on another count—a parole restitution fine may not be imposed. (*Id*. at pp. 1185-1186.)

Thereafter, our California Supreme Court decided *People v. Brasure* (2008) 42 Cal.4th 1037. In *Brasure*, a $10,000 parole revocation fine was imposed but suspended under section 1202.45. Defendant was sentenced to death, but also to a determinate term under section 1170 on other counts. The court distinguished *Oganesyan* because it involved no determinate term. "[T]o be sure, defendant here is unlikely ever to serve any part of the parole period on his determinate sentence. Nonetheless, such a period was included in his determinate sentence by law and carried with it, also by law, a suspended parole revocation restitution fine. Defendant is in no way prejudiced by assessement of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked." (*Brasure*, at p. 1075.)

As in *Brasure*, defendants' sentences included determinate terms. Notwithstanding the unlikelihood they will ever serve those terms and become eligible for parole because of their double LWOP sentences, the parole revocation fine is authorized.

F. *The victim restitution orders.*

For funeral and burial expenses, the trial court ordered defendants each to pay $7,500. They argue that the order should be modified to make the liability joint and several.

Section 1202.4, subdivision (a)(1), provides: "It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime." Subdivision (f) further provides that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) Nothing in the statute expressly requires joint and several liability.

But in *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1533-1534, the trial court ordered the two defendants to pay direct victim restitution. The defendants argued that such an order constituted unjust enrichment. The Court of Appeal noted that the trial court had the *authority* to order direct victim restitution to be paid by the defendants jointly and severally. (See also, *People v. Leon* (2004) 124 Cal.App.4th 620, 622.) Finding it "glaringly obvious" that is what the trial court meant to do, the Court of Appeal modified the judgment to provide expressly for joint and several liability. (*Blackburn*, at p. 1535.)

Blackburn does not stand for the proposition that the restitution order must be joint and several; it merely states that a trial court has the "authority" to make the order joint and several. We therefore refuse the request to modify the order.[44]

[44] Because we hold that joint and several liability need not be imposed, we do not address the Attorney General's argument that because of defendants' failure to object to the order at trial, it has been forfeited on appeal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.